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Supreme Court, U.S.
FILED
JUL 24 2009
OFFICE OF THE CLERK

No. 08-1589

IN THE
Supreme Court of the United States

DOW CHEMICAL CO.,

Petitioner,

v.

AKA RAYMOND TANOH, et al.,

Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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July 2009

QUESTION PRESENTED

Did the court of appeals err in applying the unambiguous language of the Class Action Fairness Act ("CAFA") and holding that claims "joined upon motion of a defendant," 28 U.S.C. § 1332(d)(11)(B)(ii)(II), are not "mass actions" subject to removal under CAFA?

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INTRODUCTION

Dow Chemical Co. urges this Court to grant certiorari to review the court of appeals' holding that seven separate actions brought in state court by seven unique groups of plaintiffs cannot be joined by the defendant and considered a "mass action" removable to federal court under the Class Action Fairness Act ("CAFA"). Dow has failed to present any compelling reason to grant certiorari.

First, Dow contends that the decision below is contrary to the Sixth Circuit's holding in *Freeman v. Blue Ridge Paper Products, Inc.*, 551 F.3d 405 (6th Cir. 2008). *Freeman*, however, dealt with a different section of CAFA. There, the Sixth Circuit held that the plaintiffs could not avoid federal jurisdiction under CAFA by arbitrarily dividing one class action into several class actions, distinguished only by different windows of time, to avoid CAFA's amount-in-controversy threshold while still enabling them to seek damages well in excess of that threshold. *Id.* at 406. Here, Dow contends that the plaintiffs deliberately divided themselves into seven groups of less than 100 to avoid being considered a "mass action" subject to federal jurisdiction under CAFA and that they should not be permitted to do so. Unlike the amount in controversy requirement at issue in *Freeman*, however, Congress explicitly provided that the 100-plaintiff minimum for a "mass action" is *not* satisfied when claims filed by separate plaintiffs are joined by a defendant. 28 U.S.C. § 1332(d)(11)(B)(ii)(II). Dow does not contend that there is a split among the courts of appeals on whether a defendant may join claims to create a CAFA "mass action," a question the statute's text answers unambiguously.

Second, Dow alleges that the Ninth Circuit upset settled law and created a split among the courts of appeals by "finding" that a "mass action" under CAFA "requir[es] an actual trial of 100 plaintiffs." Pet. 19. The opinion below, however, merely quoted the statute, which provides that "claims 'consolidated or coordinated solely for pretrial proceedings'" are not "mass actions" under CAFA. Pet. App. 19a (quoting 28 U.S.C. § 1332(d)(11)(B)(ii)(IV)). The Ninth Circuit did not interpret or apply that language and had no occasion to do so, as CAFA's pretrial-consolidation clause is not at issue in this case. The opinion's brief reference to this aspect of CAFA's definition of "mass action" is, at most, dictum and has no bearing on the outcome of this case.

STATEMENT

A. The Class Action Fairness Act

CAFA was passed to address Congress's concerns about important interstate class actions being decided in state court and about class-action abuse. Class Action Fairness Act of 2005, Pub. L. No. 109-2, § 2, 119 Stat. 4, 4–5 (2005). To alleviate the problem of large class actions being decided in state court, CAFA provides that, subject to a number of exceptions, federal courts have jurisdiction over class actions in which the amount in controversy exceeds $5 million and at least one class member and one defendant are diverse. 28 U.S.C. § 1332(d)(2). CAFA also provides that "mass actions" are to be deemed removable class actions, provided that the actions meet the same criteria, such as the diversity and amount in controversy requirements. 28 U.S.C. § 1332(d)(11)(A).

Congress made it more difficult to remove "mass actions" than class actions by imposing additional requirements. In addition to meeting the class action requirements for removal, "mass actions" must include claims of at least 100 plaintiffs whose claims involve common questions of law and fact, and those plaintiffs' claims must meet the usual $75,000 amount in controversy requirement for any suit brought in federal court based on diversity jurisdiction.[1] 28 U.S.C. § 1332(d)(11)(B)(i). Congress further limited "mass actions" by excluding four types of actions that would otherwise qualify as removable "mass actions." Removable "mass actions" do *not* include actions in which "(I) all of the claims in the action arise from an event . . . in the State in which the action was filed, and that allegedly resulted in injuries in that State or in" contiguous states; "(II) *the claims are joined upon motion of a defendant*; (III) all of the claims in the action are asserted on behalf of the general public . . . pursuant to a State statute specifically authorizing such action"; and "(IV) the claims have been consolidated or coordinated solely for pretrial proceedings." 28 U.S.C. § 1332(d)(11)(B)(ii) (emphasis added).

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[1]The courts of appeals have struggled with the application of the two "mass action" amount in controversy requirements—the $5 million threshold for removable class actions and the $75,000 minimum for everyday diversity jurisdiction. *See, e.g., Lowery v. Ala. Power Co.*, 483 F.3d 1184, 1203–05 (11th Cir. 2007); *Abrego Abrego v. Dow Chem. Co.*, 443 F.3d 676, 681, 686–90 (9th Cir. 2006). The amount in controversy requirements are not at issue here, as neither the court of appeals nor the district court addressed the question.

B. Facts and Proceedings Below

Respondents are seven groups of West African men who worked on banana and pineapple plantations in the Ivory Coast. They suffer from infertility, sterility, and other severe health problems caused by exposure to a Dow pesticide containing 1,2-dibromo-3-chloropropane (DBCP). The workers, who lived on the plantations, breathed DBCP-contaminated air and drank and bathed in DBCP-laced water. E.R. 21.[2] Dow knew as early as the 1950s that DBCP caused sterility in men and was "the most potent testicular toxin known to science." Pet. App. 11a n.1. Nevertheless, Dow continued to manufacture, sell, and export DBCP pesticides. *Id.* By the mid-1970s, undeniable evidence showed that DBCP exposure leads to sterility. In fact, up to 55 percent of men working at DBCP manufacturing facilities in the United States were found to be sterile or infertile. E.R. 51. In 1979, the EPA banned the use of DBCP products in the United States, but Dow continued to export DBCP pesticides to the developing world, including to plantations in the Ivory Coast until at least 1986. Pet. App. 11a n.1.

Seven different groups of Ivory Coast plantation workers each brought suit against Dow and others in California state court. Each suit included fewer than 100 plaintiffs. Dow filed a notice of removal to federal court, contending that the seven separate actions should be treated as a single "mass action" removable to federal court under CAFA. The district court remanded the

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[2]References to the Appellant's Excerpts of Record in the Ninth Circuit are denoted herein as "E.R. ___."

actions to state court *sua sponte*, reasoning that CAFA specifically excludes claims that have been joined by the defendant from the definition of removable "mass actions." *Id.* at 13a. On appeal, the Ninth Circuit vacated the district court's remand orders because the district court lacked the authority to remand *sua sponte*. Subsequently, the plaintiffs filed a motion to remand, arguing that claims joined by a defendant are not "mass actions" under CAFA and that Dow failed to demonstrate that the plaintiffs met the amount in controversy requirement. The district court granted the motion to remand, reasoning again that claims joined by a defendant are not "mass actions" under CAFA. *Id.* at 38a. Dow sought leave to appeal the remand orders. The Ninth Circuit granted leave to appeal and affirmed the district court.

In the Ninth Circuit, Dow relied heavily on *Freeman*, contending that the Sixth Circuit had held that plaintiffs cannot structure their suits to avoid federal jurisdiction under CAFA. Because, according to Dow, the plaintiffs here strategically divided themselves into seven suits to avoid the 100-plaintiff minimum for removable "mass actions," following *Freeman* would require the court to treat the seven smaller suits here as one large "mass action." The court, however, rejected Dow's characterization of *Freeman*, noting that the Sixth Circuit had "specifically 'limited [its holding] to the situation where there is no colorable basis for dividing up the sought-for relief *into separate time periods*, other than to frustrate CAFA.'" *Id.* at 24a (quoting *Freeman*, 551 F.3d at 409) (emphasis and alterations added by Ninth Circuit). Not only was *Freeman*'s holding narrow, the court stated, but the case did not involve the "mass action" provision of

CAFA at issue here. The court concluded that *Freeman*'s holding and rationale were inapposite.

The court of appeals found that the unambiguous language of CAFA—which provides that the definition of "mass action" does not include actions in which "the claims are joined upon motion of a defendant," 28 U.S.C. § 1332(d)(11)(B)(ii)(II)—dictated the result here: Because the suits do not meet the 100-plaintiff jurisdictional minimum for a removable "mass action" under CAFA, Dow, the defendant, cannot join the claims to meet that minimum. The court explained that its holding was consistent with congressional intent to provide some exceptions to "mass action" removal, as demonstrated by the other limitations Congress had placed on "mass actions," including the provision excluding claims "consolidated or coordinated solely for pretrial proceedings." 28 U.S.C. § 1332(d)(11)(B)(ii)(IV).

REASONS FOR DENYING THE WRIT

I. There Is No Circuit Split on the Question Whether Claims May Be Joined by a Defendant to Meet the 100-Plaintiff Requirement for Removal Under CAFA.

The decision below holds that because Dow, a defendant, sought to join the plaintiffs' claims in one action and CAFA explicitly states that claims joined by a defendant are not removable "mass actions" under CAFA, the plaintiffs' seven separate actions are not a removable "mass action." Dow has cited no other court of appeals case applying this exclusion, and there is none. In short, there is no relevant circuit split on Dow's first question presented.

Dow does not dispute that it seeks to join the plaintiffs' claims to meet the 100-plaintiff threshold for a "mass action," and that defendant-initiated joinder precludes removal under the unambiguous terms of § 1332(d)(11)(B)(ii)(II). Rather, Dow contends that the court below ought to have disregarded the statutory language and that, by not doing so, it created a conflict with the Sixth Circuit's holding in *Freeman*.

In *Freeman*, class-action plaintiffs divided their state-court water-pollution nuisance suit into five separate actions, each covering a different six-month period and each seeking damages just under the $5 million jurisdictional threshold. 551 F.3d at 406. The plaintiffs and defendants in each suit were identical, and the defendants removed the case to federal court under CAFA. *Id.* Holding that CAFA provided federal jurisdiction over the aggregated cases, the Sixth Circuit explained that, although plaintiffs may generally seek to avoid removal by seeking less than the CAFA thresholds, "where recovery is expanded, rather than limited, by virtue of splintering of lawsuits for no colorable reason, the total of such splintered lawsuits may be aggregated." *Id.* at 409. The Sixth Circuit was primarily motivated by the fact that, by dividing the suit, each plaintiff could multiply his or her potential recovery without being subjected to federal jurisdiction.

The Sixth Circuit explicitly limited its holding to instances in which claims alleged by an identical class are arbitrarily divided by time period. *Id.* Dow, however, contends that *Freeman* stands for the broad proposition that plaintiffs can never make strategic decisions to structure their suits to avoid federal jurisdiction under

CAFA. That reading is squarely contrary to the Sixth Circuit's recognition that plaintiffs may—and often do—make sacrifices to avoid federal jurisdiction. *Id.* The Sixth Circuit even noted that, in some circumstances, it may be appropriate to divide nuisance class actions by time period. *Id.* at 408.[3]

Nothing in *Freeman* conflicts with the decision below, and there is no reason to believe that the Sixth Circuit would have decided this case differently. First, CAFA does not address whether a series of class-action suits brought by an identical plaintiff class against identical defendants alleging virtually identical claims distinguished only by the time periods at issue may be treated as one suit for the purposes of federal jurisdiction under the statute. Because of that silence, *Freeman* looked to CAFA's overall purpose and legislative history, which indicate that Congress was concerned with class-action lawyers "gaming" the system, particularly in interstate or national class actions. *Id.* at 407–08.[4]

In contrast, Congress explicitly spoke to the situation presented here. CAFA states that "mass actions" do *not*

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[3]The only other case Dow cites that rejects plaintiffs' structuring of a case is an unpublished district court opinion that also dealt with a plaintiff class that divided its suit by time period to avoid the amount in controversy threshold. *See Proffitt v. Abbott Labs.*, 2008 WL 4401367 (E.D. Tenn. Sept. 23, 2008).

[4]The Sixth Circuit may also have been influenced by the fact that the plaintiff class had previously brought suit making the same allegations with regard to yet a different time period. *Freeman*, 551 F.3d at 406. The plaintiff class had prevailed in that suit, winning an aggregate award of $2 million. *Id.*

include "claims that are joined upon motion of a defendant." 28 U.S.C. § 1332(d)(11)(B)(ii)(II). In denying defendants the ability to challenge plaintiffs' decision not to bring a single larger suit, Congress expressed an unambiguous intent to preserve those plaintiffs' decision to bring multiple suits of fewer than 100 plaintiffs, even if the plaintiffs could have joined together in one suit that would have been subject to CAFA removal jurisdiction. The joinder-by-defendant exception is one of several exceptions to federal jurisdiction over class and mass actions outlined by Congress in the statute. Other exceptions include the home-state exception, 28 U.S.C. § 1332(d)(3)–(4), cases involving securities claims, 28 U.S.C. § 1332(d)(9), and cases asserted on behalf of the general public, 28 U.S.C. § 1332(d)(11)(B)(ii)(III). Dow's interpretation of the Sixth Circuit's holding in *Freeman*, and the holding Dow urges in this case, is that these clauses are to be disregarded if plaintiffs structure their suit or suits to take advantage of them. Such an interpretation nullifies the exceptions that Congress has written into the statute.

Furthermore, many of the policy concerns evident in *Freeman* are not present here. *Freeman* concerned the same class of plaintiffs structuring their suits to avoid federal jurisdiction over class claims in excess of $5 million, while still seeking nearly $25 million in damages. *Freeman*, 551 F.3d at 409. Here, each suit was brought by a unique group of plaintiffs, each of whom seeks to recover one time in his one lawsuit.[5]

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[5]Dow complains of "copycat" lawsuits seeking damages for the devastating effect of DBCP on plantation workers. Those suits

(continued...)

Although not cited by Dow, the First Circuit has also recently decided a case involving allegations that a plaintiff class impermissibly structured its suit to avoid federal jurisdiction under CAFA. *See Grimsdale v. Kash N' Karry Food Stores, Inc.*, 564 F.3d 75 (1st Cir. 2009). In *Grimsdale*, a class defined to include only Florida citizens brought suit against a Florida corporation in Florida state court. *Id.* at 76. Kash N' Karry, the defendant corporation, removed the case to federal court in Florida, and the case was transferred to Maine to be consolidated with twenty-four other class-action suits alleging similar wrongdoing against Kash N' Karry. *Id.* at 77. The *Grimsdale* class moved to remand its suit to state court under CAFA's home-state exception, which provides that suits primarily involving plaintiffs and defendants from the same state are not subject to removal to federal court, even if they otherwise meet the requirements for federal jurisdiction. *Id.*; *see* 28 U.S.C. § 1332(d)(4). That motion was granted, and the First Circuit affirmed. *Grimsdale*, 564 F.3d at 77, 81.

Like Dow here, Kash N' Karry argued that the plaintiffs were structuring their complaint to frustrate CAFA's purpose and avoid federal jurisdiction. *Id.* at 79–80. Rejecting Kash N' Karry's argument, the First Circuit discussed both this case and *Freeman*, explaining that the analysis of a claim of evasion of congressional intent "will turn on the precise language of that section of

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[5](...continued)
were brought by workers in a different part of the world (Central America). *See Obregon v. Dole Food Co., Inc.*, 2009 WL 689899 (C.D. Cal. Mar. 9, 2009).

CAFA. Our job is to effectuate the intent expressed in the plain language Congress has chosen, not to effectuate purported policy choices regardless of language." *Id.* at 80. In other words, just as the Ninth Circuit did, the First Circuit harmonized this case and *Freeman* on the basis of the plain language of the statute.

As in *Grimsdale*, the statutory language at issue here is unambiguous, and Dow does not argue otherwise. Indeed, Dow fails to explain how its argument is consistent with CAFA's joinder-by-defendant provision. *See Walters v. Metro. Educ. Enters., Inc.*, 519 U.S. 202, 209 (1997) ("Statutes must be interpreted, if possible, to give each word some operative effect."). Because "the intent of Congress is clear and unambiguously expressed by the statutory language at issue, that [should] be the end of [the] analysis." *Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ.*, 550 U.S. 81, 93 (2007); *see Grimsdale*, 564 F.3d at 79 n.4, 80.

II. The Ninth Circuit Made No Holding Regarding Joinder for Pretrial Purposes.

Dow contends that the Ninth Circuit held that "mass action" jurisdiction requires that at least 100 plaintiffs will be parties to "an actual trial" and that the court's "holding" is contrary to the holdings of other courts. The court of appeals, however, held no such thing because this case presents no such issue.

In discussing CAFA's structure, the opinion below quotes other exceptions to federal removal jurisdiction over "mass actions," including the clause providing that suits in which "the claims have been consolidated or coordinated solely for pretrial proceedings" are not

removable "mass actions." 28 U.S.C. § 1332(d)(11)(B)(ii)(IV); Pet. App. 19a. The opinion then paraphrases the text of the statute. On this one sentence—in a discussion that comes *after* the court has stated its holding—Dow builds an argument that certiorari should be granted on its second question presented. The Ninth Circuit, however, used the exception only to illustrate the point that Congress placed a number of restrictions on removability of "mass actions" that it did not place on class actions, including both the joinder-by-defendant and pretrial-consolidation exceptions. The pretrial-consolidation exception to CAFA jurisdiction over "mass actions" is not presented by this case.

Dow also avers that the Ninth Circuit incorrectly concluded that Congress intended to place greater limitations on the removability of "mass actions" than on class actions. Dow's position, however, is belied by the additional requirements that CAFA places on "mass actions," but not on class actions, to qualify as removable and the additional exceptions to removability provided exclusively for "mass actions." For example, Congress requires plaintiffs in "mass actions" to individually meet the $75,000 amount in controversy requirement in addition to the CAFA $5 million threshold, which class plaintiffs need not do. 28 U.S.C. § 1332(d)(11)(B)(i). In addition to the joinder-by-defendant and pretrial-consolidation exclusions already mentioned, Congress also excludes suits that are otherwise removable "mass actions" if the event occurred in the state where the suit is filed and the injuries were suffered in that or contiguous states. 28 U.S.C. § 1332(d)(11)(B)(ii)(I). Although both mass and class actions may take advantage of the home-state exception,

only "mass actions" are entitled to this additional location exception. Given the number of requirements and exceptions involving "mass actions" in the text of the statute, the Ninth Circuit's conclusion that Congress intended to place more limitations on the removal of "mass actions" than class actions is unsurprising.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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